

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL

77-1290

**United States Court of Appeals
For the Second Circuit**

UNITED STATES OF AMERICA,

Appellee,

-against-

ANTHONY RICCO,

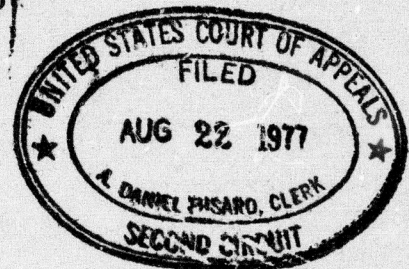
Appellant.

*On Appeal From The United States District Court
For The Southern District Of New York*

APPELLANT'S BRIEF

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

77-1290

-v-

ANTHONY RICO,

Appellant

APPELLANT'S BRIEF

STATEMENT OF ISSUES

1. Whether the testimonial use of unsealed intercepted communication by a witness is an improper use or disclosure of said communications or evidence derived therefrom pursuant to C.P.L. § 700.65(3) and 18 U.S.C. § 2518(8) (a)?

PRELIMINARY STATEMENT

This is an appeal from a judgement of conviction entered on June 17, 1977 in the United States District Court for the Southern District of New York (Lasker, J.).

Appellant Anthony Ricco was found guilty, after a trial by jury, of one count of conspiracy to violate the narcotics laws and two counts of violating 21 U.S.C. § 841. Appellant was sentenced to concurrent terms of seven (7) years imprisonment on the conspiracy count and one substantive count, to be followed with a six year period of special parole. The sentence of imprisonment on the second substantive count was suspended and a term of five years probation imposed.

STATEMENT OF FACTS

Government's Case

Albert Rossi first met with Anthony Ricco (Tony Bragirole) in February or March, 1971 (66).^{*} Rossi had known Angelo Ricco, appellant's nephew since December of 1970. Angelo introduced Rossi to appellant. (67). In February or March, 1971, Rossi borrowed \$5,000 from Bragirole to buy cocaine (72). Rossi was unable to pay the money back, so in October 1971, Rossi had a meeting with appellant and Angelo Ricco to find a way to pay off the debt (73-75). At this meeting, it was agreed that appellant and Angelo would supply narcotics to Rossi on consignment to work off the debt (75-76).

At this time, Rossi formed a partnership in the narcotics business with Fred Blase, a fellow employee. Shortly after forming this partnership, Rossi again met Angelo Ricco and received an ounce of heroin (77-78). Rossi and Blase cut this heroin and began to seek buyers (80-81). They made a few sales from this ounce to various buyers (82). Rossi paid Angelo Ricco for the ounce and split the remaining money with Blase (83). The above procedure was repeated three or four more times (84).

During the period December 1971 to July 1972, Rossi and Blase continued to obtain narcotics from appellant and Angelo Ricco (88-90). Rossi also took on two new partners, Peter and Anthony Crescenti (93). Rossi continued to get drugs from Angelo and Anthony Ricco. At their meetings, Charles Indivigliata was present, and Indivigliata would deliver heroin to Rossi, who would sell it and pay appellant or Angelo Ricco (90-92,94).

In April 1972, Rossi, Blase, the Crescentis, and George Carrado went to Florida (97). In July 1972, Rossi, Blase, and Robert Browning went to Puerto Rico, where Browning introduced James Rizzieri to Rossi. Rossi and

^{*}References are to the typewritten minutes of trial.

Rizzieri agreed to deal with each other in the future (100-101, 104-106).

After returning to New York, Rossi again met with Anthony Ricco and Angelo Ricco. Rossi still owed them money. Rossi informed them that he had met Rizzieri who could move drugs (107). It was agreed that Bragiolo would continue to supply Rossi with narcotics, but in larger amounts (108). Rossi then met with Rizzieri. They agreed to become partners and to get rid of Blar (108--09).

In August 1972, Rossi talked with appellant and Angelo Ricco (109). Arrangements for a delivery were made and "Tony" (not appellant) made a delivery of two ounces (109). Rizzieri and Rossi diluted this into an eighth of a kilo and sold it (110).

Over the next several months, August to December, 1972, Rossi picked up large quantities of heroin from Anthony or Angelo Ricco and resold it (111-113). This occurred about forty or fifty times. The largest transaction involved two kilos of pure heroin (114). Sometime in September of 1972, appellant told Rossi that he had a direct wire, or contact, in law enforcement who gave appellant advance information on indictments or arrests (124). Appellant also told Rossi the drugs were coming from Marseilles, France (117).

During their contacts, Rossi and Angelo Ricco became very close. In fact, Rossi became the godfather of Angelo Ricco's child (143-144). At this child's Christening party, appellant, Angelo Ricco, Rossi and Rizzieri spoke about payment of monies owed for drugs (154-155).

In November 1972, Rossi met with John DiSalvo who said he had good buyers (130-131). Rossi made up an eighth of a kilo and sold it to DiSalvo (131).

Subsequently, Rossi obtained two kilos of pure heroin from appellant and Angelo Ricco (162-166). A sale was made, but the buyer returned them

because they were not pure (168). Rossi went to appellant and Angelo Ricco to tell them what happened (172). Angelo told Rossi that since he took the goods he was responsible for payment (173). Rossi kept the drugs (173).

Early in 1973, Rossi went to Florida. At this time, Rossi still owed \$26,000 for the two kilos (174). When Rossi got back to New York he discovered that Rizzieri had diluted the remainder of the two kilos of heroin (174-175). Rossi pulled a gun on Rizzieri during a conversation ending the partnership (176-177). These two kilos were the last which Rossi received from appellant (177). However, in February 1973 Rossi paid \$13,000 to Angelo Ricco (178) but Angelo still held him responsible for the remaining \$13,000 (178).

Rossi didn't see Angelo Ricco from that time until Angelo's trial. He did see appellant several more times (179-183).

In April 1973, Rossi met with appellant and indicated that he might be able to arrange for a sale to Frank Matthews (181). Appellant told him to get the money first, but Rossi could not raise the money (183).

In early 1974, Rossi was arrested and began to cooperate with government (188).

Agent Donald Ferrarone was involved in sales of heroin from Rizzieri in late 1972 and early 1973. On February 5, 1973 Ferrarone met Rossi (506). A few days later, the agent met with Rizzieri to make a second buy (509). In March, Rizzieri had already been arrested and was looking for a new source (515). The sale did take place the next day as a new source was found. Rizzieri was then arrested (517).

Peter Mengrone worked as a bouncer at the Four Winds Bar from October 1971 to September 1972 (617). In September 1972, he bought the Magic Carpet (619). Throughout this period, Mengrone saw meetings between appellant, Angelo Ricco, Rossi, Rizzieri, Indiviglia and John DiSalvo (619-644). Subse-

quently, Mengrone found out that drugs were being dealt at the Magic Carpet (645). He spoke to appellant and Angelo Ricco and told them not to deal drugs at his club. They, in turn, said that they had not been dealing drugs (646). Several days later, Mengrone conveyed a message to appellant and Angelo Ricco that Rizzieri, who had been arrested, would do his time and that no one should worry (648).

Mengrone's club was not profitable and he began to fall into debt. To extricate himself from this position, Mengrone sold the club to appellant and Angelo (650). Moreover, Mengrone entered the narcotics business by trying to find customers for appellant's narcotics (651-652).

In June 1973 Mengrone was involved in a "circular," three-way transaction involving Gary Bearson and Nick Visciglia (654-659). The deal was abandoned when it turned out to be a circle deal involving the same drugs (659-660).

In July 1973 Mengrone spoke to James Venia who told him that he had six kilos of heroin available at \$40,000 per kilo (667). Mengrone relayed this information to appellant and Angelo Ricco, who said they were willing to pay \$35,000 per kilo on delivery (667-668). Despite this, Mengrone, after stealing \$2,000, fronted the remaining money to Venia. The deal fell through and the \$33,000 was not returned. Mengrone told appellant and Angelo what had happened. However, appellant said not to worry since they knew who stole their money and if necessary they would kidnap one of the thief's children for ransom (668-674).

In September 1973, Mengrone spoke to Frank Lucas, who wanted to buy large quantities of heroin. Mengrone spoke to appellant who told him that only cocaine was available. Mengrone brought Lucas a sample but nothing further came of it (674-675). Later, appellant told Mengrone that heroin was again available. In October 1973, Mengrone went to meet appellant to arrange

a sale to Lucas. Mengrone made contact and was given a sample of heroin by appellant. Appellant told Mengrone that if Lucas liked the sample, he, Anthony Ricco, would deal directly with Lucas. Lucas was not willing to pay the price asked so this sale also fell through (679-681).

Mengrone later got into trouble with Lucas because of Rossi's theft of \$30,000 in a deal Mengrone set up (683). Mengrone went to appellant to get help in getting the money back. Anthony and Angelo Ricco agreed to help since they too were owed money by Rossi (685-687).

In October 1973, Mengrone told appellant that he had an old customer, Eddie, who would buy heroin (689). Eddie was, in reality, an undercover agent. Arrangements were made, but at the last minute appellant changed the plans so that he would handle the sale himself (690-696). Mengrone went to O'Donnell's apartment to wait for appellant. Before appellant came, the police arrived and arrested Mengrone (696).

Gary Pearson met Mengrone in May 1973. They met a short time later to set up a cocaine transaction (854). Pearson was DiSalvo's partner at this time. This transaction never occurred, as it became the circular transaction Mengrone testified about (855-859).

Pearson was told by Mengrone that Anthony and Angelo Ricco supplied Mengrone with narcotics (860).

In approximately September 1973, Pearson was involved with Rossi in the theft of a large amount of pure cocaine in Florida (860). Pearson attempted to sell some of this cocaine to Angelo Ricco, but nothing came of it (861).

POINT

THE TESTIMONIAL USE OF UNSEALED COMMUNICATIONS
BY A WITNESS IS AN IMPROPER USE OR DISCLOSURE
PURSUANT TO C.P.L. § 700.65(3) AND 18 U.S.C.
§ 2518(8) (a) REQUIRING REMAND FOR A NEW TRIAL
OR, IN THE ALTERNATIVE, A HEARING ON THE
EXTENT OF THE IMPROPER USE OR DISCLOSURE.

On September 28, 1976 the Honorable Morris E. Lasker, U.S. District Judge, ruled that certain wiretap recordings, obtained pursuant to New York State court orders, and their transcriptions were inadmissible against appellant Anthony Ricco due to a delay, inexcusable under New York law, in sealing the wiretaps. United States v. Ricco, 421 F.Supp 401 (S.D.N.Y. 1976). However, the court denied appellant's motion to suppress the testimony of Peter Mengrone as an improper use or disclosure of the wiretap recordings and and transcripts. 421 F.Supp at 411. Appellant renewed this motion at trial without effect.*

It is clear from the statement of the Assistant United States Attorney at trial that Mengrone had listened to the tapes and read the transcripts in question to prepare for his trial testimony (see p.4-5 of the typewritten transcript of trial). Mengrone used the tapes to prepare for his trial testimony in the case of United States v. Angelo Ricco, 75 Cr. 411, and read at least one transcript before the trial below. It is also clear, that Mengrone's use of the tapes and transcripts involved an improper use or disclosure under both New York C.P.L. § 700.65(3) and 18 U.S.C. § 2518(8) (a)** and, therefore, it was error to permit him to testify.

*See, typewritten transcript of trial, p 2.

**New York C.P.L. § 700.65(3). Any person who has received, by any means authorized by this article, any information concerning a communication, or evidence derived therefrom, intercepted in accordance with the provisions of this article, may disclose the contents of that communication or such derivative evidence while giving testimony under oath in any criminal proceeding in any court or in any grand jury proceeding; provided, however, that the presence of the seal provided for by subdivision two of section 700.50, or a satisfactory explanation of the
(footnote continued on the next page)

In Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§ 2510-2520) Congress enacted a comprehensive scheme for the regulation of wiretapping and electronic surveillance. Gelbard v. United States, 408 U.S. 41, 46 (1971). All state procedures are required to meet the "minimum standards reflected as a whole" in Title III. See 18 U.S.C. § 2516(2); 2 U.S. Code Cong. and Adm. News 2112, 2187 (1968). In New York, Article 700 of the Criminal Procedure Law (Henceforth referred to as C.P.L.) was enacted to implement Title III in New York and substantially tracks the provisions and language of Title III. People v. Sher, 38 N.Y. 2d 600, 604 (1976); People v. Simmons, 84 Misc. 2d 749, 378 N.Y.S. 2d 263, 265 (Sup. Ct., N.Y. Cty. 1975).

Both C.P.L. § 700.65(3) and 18 U.S.C. § 2518(8) (a) plainly state, inter alia, that a seal, or a satisfactory explanation for the absence thereof, is a "prerequisite for the use or disclosure of the contents of any communication or evidence derived therefrom."

When the government seeks to use wiretaps authorized under state law, as here, it is bound by those state requirements which are more stringent than

absence thereof, shall be a prerequisite for the use or disclosure of the contents of any communication or evidence derived therefrom.
18 U.S.C. 2518(8) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

those imposed under the federal statute alone. United States v. Manfredi, 488 F.2d 588, 598 n.7 (2d Cir. 1973), cert. denied 417 U.S. 936 (1974); United States v. Marion, 535 F.2d 697, 702 (2d Cir. 1976). Of course, the federal statute must control if state law imposes less stringent conditions than Title III. Marion, supra at 702.

This Court has recently observed that

Congress in enacting Title III's sharply detailed restrictions on electronic surveillance, intended to "ensure careful judicial scrutiny throughout" the process of intercepting and utilization of such evidence. United States v. Marion, 535 F.2d 697, 698, No. 75-1408 (2d Cir. May 7, 1976).

The immediate sealing and storage of recordings of intercepted conversations, under the supervision of a judge, is an integral part of this statutory scheme. Section 2518(8)(a) was intended "to insure that accurate records will be kept of intercepted communications". S.Rep. 1097, 90th Cong. 2d Sess., quoted in 2 U.S. Code Cong. and Ad. News, 2112, 2193 (1968). Clearly all of the carefully planned strictures on the conduct of electronic surveillance, e.g., the "minimization" requirement of § 2518(5), would be unavailing if no reliable records existed of the conversations which were, in fact, overheard. Maintenance of the integrity of such evidence is part and parcel of the Congressional plan to "limit the use of intercept procedures to those, situations clearly calling for the employment of this extraordinary investigative device." United States v. Giordano, 416 U.S. 505, 527, 94 S. Ct. 1820, 1832, 40 L.Ed. 2d 341 (1974). Moreover, it plays a "central role in the statutory scheme". Id. at 528, 94 S. Ct. at 1832. See also, United States v. Chavez, 416 U.S. 562, 94 S. Ct. 1849, 40 L.Ed. 2d 380 (1974).

United States v. Gigante, 538 F.2d 502, 505 (2d Cir. 1976).*

*The ruling in Gigante is in no way disturbed by the recent decision in Alfano v. United States, 555 F.2d 1128, No. 77-2013 (2d Cir. June 8, 1977). In Alfano, this Court held that where post-conviction relief is sought, evidence of actual tampering is required, but that the Gigante prophylactic rule remains for pre-trial sealing motions. 555 F.2d 1129 n.2.

Section 2518(8) (a) must be viewed, in pertinent part, as a mandatory minimum custodial requirement and evidence which does not meet said minimum cannot be used because it is legally unreliable. United States v. Gigante, supra; see also, United States v. Donovan, -U.S.-, 97 S.Ct. 658, 671 (1977). New York case law clearly gives the same effect to the C.P.L. sealing provision. People v. Nicoletti, 34 N.Y. 2d 249 (1974); People v. Sher, supra. Further, both the law of this Circuit and New York clearly state that an untimely sealing is the same as no sealing at all. United States v. Gigante, supra at 506-507; People v. Scaccia, 390 N.Y.S. 2d 743 (4th Dept. 1977); People v. Simmons, supra. The purpose of this sealing requirement, held by both this Court and New York courts to be mandatory (absent satisfactory explanation) and central to the statutory scheme, is to avoid the privacy abuses resulting from electronic eavesdropping and to assure the reliability of the resultant wiretap evidence. The New York Court of Appeals adds a third stated purpose - to aid in establishing a chain of custody - and requires strict compliance with the statute. People v. Nicoletti, supra at 253; People v. Sher, supra at 603-605.

Thus, both state and federal statutes provide for continuous judicial scrutiny of the entire process of obtaining and utilizing recorded conversations. In fact, the legislative history is clear that once sealed, the tapes must "be considered confidential court records." 2 U.S. Code Cong. and Adm. News at 2193; see also, People v. Sher, supra at 604.

Once wiretap evidence has been found inadmissible due to the absence of the required seal (or a satisfactory explanation), no "use or disclosure of the contents....or evidence derived therefrom...." may be made as part of a witness' testimony under oath in any criminal proceeding. See, 18 U.S.C. §§ 2517(3), 2518(8) (a); C.P.L. § 700.65(3).

Clearly, this language required the District Court to prohibit Mengrone from testifying. The government will contend that Mengrone testified from his independent recollection, using the tapes and transcripts merely to refresh his recollection as to certain particulars. But this is still a straightforward "use" of the tapes' contents or evidence derived from them as part of his testimony and flies directly in the face of the rigid prohibition of 18 U.S.C. § 2518(8) (a).^{*} There can be little doubt that the opportunity to hear and read the tapes and transcripts aided Mengrone in his testimony, if not providing data to adopt in his testimony where he had no independent recollection.

18 U.S.C. § 2510(8) defines "contents" in respect to any wire or oral communication as including "any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication." This includes all aspects of the communication. "The privacy of the communication to be protected is intended to be comprehensive." 2 U.S. Code Cong. and Adm. News, *supra* at 2179.

To implement this broad intent of the Congress, it must follow that when the statute prohibits any testimonial use, no use, in any fashion, shall be made of the suppressed communications in a criminal proceeding. Surely, employing a tape or transcript to refresh one's recollection is a use within the ordinary meaning of that word and, just as surely, after condoning this use the government cannot now deny that some evidence or information gained by

^{*}The recent decision in United States v. Fury, 554 F.2d 522 (2d Cir. 1977) cert. denied sub nom. Quinn v. United States, 21 Crim L. Repr. 4095 (June 27, 1977), is not applicable herein, as the Court there held that unsealed tapes could be used to provide probable cause to support the issuance of another wiretap order, even if the unsealed tapes could not be used at trial. The Fury Court noted that it was dealing with derivative use only, not testimonial use, which is at issue in the instant case.

this use was disclosed to the jury at trial.*

Transcripts are obviously powerful tools and, when the tape itself is admissible, must be handled by a trial court with care so the jury uses the transcripts only as an aid in listening, not as evidence itself. United States v. Turner, 528 F.2d 143, 167 (9th Cir. 1975); Unites States v. Bryant, 480 F.2d 785, 790-791 (2d Cir. 1973); People v. Feld, 305 N.Y. 322, 331 (1953); People v. Lubow, 29 N.Y. 2d 58, 68 (1971). Careful and emphatic instructions to the jury are necessary to avoid possible inaccuracies in the transcript being accepted as evidence. Bryant, supra at 791; United States v. McMillan, 508 F.2d 101, 105-106 (8th Cir.) cert. denied, 421 U.S. 916 (1975). Where, as here, the tapes have already been held legally unreliable, to permit the Mengrone to use an unverified (either by stipulation or the court) transcript to refresh his recollection multiplies the prejudice to appellant.

It would strain one's credibility to maintain that the witness needed his recollection refreshed, yet gained no information on the identities of other parties or the existence, substance, purport, or meaning of the communications from the use of the tapes and transcripts that had been found legally inadmissible. Further the phrase "any evidence derived therefrom..." is further support for appellant's position. If Mengrone's recollection needed to be refreshed, then there must have been either gaps in his independent recollection or events that made him unsure of his recollection. By hearing the tapes and reading the transcripts, the witness could resolve these doubt's and clarify his testimony without adopting the communications themselves. Yet, this also clearly violates the statute, in that his testimony was thus

*At this time, no precise facts can be set forth on this use, but appellant submits that, at the least, a remand for a hearing on the extent and effect of the use or disclosure of legally unreliable tapes and transcripts is required.

derived, at least in part, from the inadmissible, unreliable communications.

Any such use or disclosure (appellant contends that it is difficult to imagine any other explanation as to the effect of the tapes and transcripts via the use the government acknowledges) is a violation of the statute since the identity of the parties or the existence, substance, purport, or meaning of the communications which failed to comply with the sealing requirement was testified to at appellant's trial. The result was a violation of appellant's Title III rights.

Appellant contends that this result is required under both New York and Federal law. The sealing provision is a critical and central part of the statutory scheme of Title III. See, United States v. Gigante, supra at 505. And it is clearly a prerequisite to any testimonial use of the intercepted communications. United States v. Gigante, supra. The New York Court of Appeals has insisted that this requirement be strictly construed. People v. Nicoletti, supra; People v. Sher, supra. Recently, the New York court held that total suppression of all conversations and the fruits thereof was required for a "blatant" violation of the minimization requirements of Article 700, also interpreted as a crucial safeguard and check in the statutory scheme. People v. Brenes, - N.Y. 2d - (June 14, 1977). The court noted that such disregard for the requirement of minimization mandated total suppression, the most drastic remedy on the scale set forth. Appellant contends that similar, total suppression is required here, for New York courts and this Court have held that an untimely, unexplained sealing is the same as no sealing at all. United States v. Gigante, supra; People v. Scaccia, supra; People v. Simmons, supra. Thus, the violation of the wiretaps statute must be seen as legally complete, and the remedy must also be complete - a total prohibition of testimonial use of the intercepted communications, including the trial testimony of Peter Mengrone, who used the wiretaps and transcripts or evidence derived therefrom

in said testimony.*

CONCLUSION

FOR THE REASONS ABOVE APPELLANT'S
CONVICTION SHOULD BE REVERSED AND
THE CASE REMANDED FOR A NEW TRIAL
OR, IN THE ALTERNATIVE, A HEARING
ON THE EXTENT OF THE IMPROPER USE
AND² DISCLOSURE

Respectfully submitted,

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*Should the Court feel a finding of total suppression of Mengrone's testimony is not appropriate at this point, in the alternative, appellant requests a remand for a hearing, for the government to establish the extent of Mengrone's improper use and disclosure.

WEISENFELD
STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 22 day of August 1977 deponent served the within BRIEF upon

U.S. Atty. So. Dist. of NY

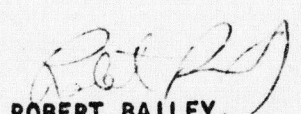
attorney(s) for

Appellee

In this action, at

1 St. Andrews Pl., NYC

the address(es) designated by said attorney(s) for that purpose by depositing 3 copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.


ROBERT BAILEY

Sworn to before me, this 22day
of August, 1977


WILLIAM BAILEY
Notary Public, State of New York
No. 43-012945
Qualified in Richmond County
Commission Expires March 30, 1978